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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,

Petitioners,

v.

CHEVRON U.S.A., INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May an employer whose employees are governed by a collective bargaining agreement ("CBA") remove the state law privacy claim of a discharged employee to federal court, thereby preventing the state court from construing the applicable state law, on the ground that the state law claim may be preempted by the CBA and section 301 of the Labor-Management Relations Act ("LMRA"), because the CBA arguably waives the privacy rights of the employee?

2. Does the mere existence of a CBA, regardless of its content, which the employer contends undercuts or defeats the state law privacy claim by a discharged employee, wholly preempt the state claim so that a court may dismiss the claim without determining either the relevance of the CBA to the claim under state law, or the actual way in which the CBA applies to the specific conduct that forms the basis of the state law claim?

PARTIES BELOW

All parties in the lower courts are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David Stikes and the class of all persons similarly situated hereby petition the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that affirmed the removal and dismissal of this action.

OPINIONS BELOW

The opinion of the court of appeals is reported at 914 F.2d 1265, and is set forth in the Appendix ("Pet. App.") at

pages 1a-13a. The district court did not issue an opinion, but discussed the issues with counsel at hearings and then issued orders refusing to remand the case to state court, Pet. App. 14a-15a, refusing to reconsider remand or to abstain to permit central issues of state law to be decided in state court, Pet. App. 16a-17a, and granting summary judgment for defendants on grounds of federal preemption. Pet. App. 18a-19a.

JURISDICTION

The court of appeals issued its decision on September 17, 1990. Pet. App. 1a-13a. A timely petition for rehearing was denied on December 12, 1990. Pet. App. 20a-21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1 of the California Constitution provides as follows:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Section 301 of the Labor-Management Relations Act, 29

U.S.C. § 185, provides as follows in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. Facts.

Petitioner David Stikes, a citizen of California, was employed by respondent Chevron USA, a corporation whose principal place of business is in California. His employment was regulated by a variety of federal, state and local laws, as well as by a collective bargaining agreement ("CBA"), between Chevron and the International Union of Petroleum and Industrial Workers, which had no express language concerning privacy or searches. Stikes traveled to work in his personal automobile, which he parked in a company parking lot. He did not use the car for work purposes, and there was no other convenient means of transportation to work. The nearest legal parking, apart from the company lot, was three miles away.

In 1984, during the course of Stikes' employment, Chevron issued a policy asserting the right to search its employees for drugs, weapons, and other materials. On July 2, 1987, a Chevron security officer interrupted a training film that petitioner and other employees were watching, to demand a search of everybody in the room, including not only the employees' persons, but their lunchpails, lockers and cars.

Chevron later explained that the purpose was to find alcohol, narcotics or firearms, but it did not contend that it had probable cause, reasonable suspicion, or, indeed, any basis at all for suspecting that any of the persons present possessed such items.

Fearful of losing his job for refusing, petitioner allowed the search of his person, lunch and locker, but refused to turn over the keys of his car so that it, too, could be searched. He recognized that there was some reasonable relationship between his person, lunchpail, and locker and the workplace. But, he felt, in America an individual may not be subjected to searches without some ground for thinking that the individual has done something wrong, and so he drew the line at his car.

Chevron disputes Stikes' vision of America. Chevron believes that it is entitled to search workers and their personal property, even if not work-related, without any grounds. Thus, when Stikes refused to be searched, Chevron summarily fired him. Stikes filed a grievance asserting that, by firing him, Chevron had violated the CBA. Chevron disagreed, and the union refused to seek arbitration, because the "case cannot be arbitrated ... because it has nothing to do with the union contract." Clerk's Record Below, Item 1, Exhibit H, ¶ 33.

B. The California Law of Privacy.

To understand the questions of jurisdiction and preemption that are presented here, it is necessary to review the settled and unsettled issues of the California law of privacy. Article I, Section 1 of the California Constitution expressly guarantees an "inalienable" right of privacy. The California Supreme Court has repeatedly held that this section authorizes civil suits to enforce that right. *E.g.*, *White v. Davis*, 13 Cal. 3d 757, 774-776, 533 P.2d 222 (1975); *Long Beach City Employees' Ass'n v. City of Long Beach*, 41 Cal. 3d 937, 948, 719

P.2d 660 (1986). *See also City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436 (1980). Numerous decisions of the California Courts of Appeal have held that the state constitutional right of privacy (unlike the federal constitution) affords protection against private, not just governmental action. *E.g., Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 228 Cal. Rptr. 545, 549 (1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220 (1984); *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 248, 255, 208 Cal. Rptr. 524 (1984); *Kinsey v. Macur*, 107 Cal. App. 3d 265, 272, 165 Cal. Rptr. 608 (1980); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839 (1976); *Laguna Pub. Co. v. Golden Rain*, 131 Cal. App. 3d 816, 851, 182 Cal. Rptr. 813, 834 (1982). Dictum in *White v. Davis*, *supra*, 13 Cal. 3d at 774-775, supports these holdings.

Hotly disputed in this case has been the question whether an employee's privacy rights can be waived in the CBA as a matter of California law, and whether, as a matter of fact, petitioner's rights had been waived in this CBA. Petitioner pointed to the language of the California Constitution, which describes privacy as an "inalienable" right, and relied on California cases holding that an employee's purported waiver of constitutional or statutory rights as a condition of employment, even in a CBA, is invalid. *E.g., Long Beach City Employees' Ass'n v. City of Long Beach*, 41 Cal. 3d 937, 951, 719 P.2d 660 (1986); *Judson Steel Corp. v. Workers Compensation Appeals Board*, 22 Cal. 3d 658, 665 n.5, 150 Cal. Rptr. 250 (1978); *Fire Fighters Local 55 v. City of San Leandro*, 181 Cal. App. 3d 179, 182-183, 226 Cal. Rptr. 238 (1986). *Cf. Machinists Auto. Trades Dist. Coun. 190 v. Utility Trailer Sales*, 141 Cal. App. 3d 80, 82-83, 190 Cal. Rptr. 98, *app. dism.*, 464 U.S. 1005 (1983). In recent years, the California Courts of Appeal have divided on the question whether the right of privacy is waivable in the context of employment in the private sector. *Compare Semore v. Pool*, 217 Cal. App. 3d 1087, 1097, 266

Cal. Rptr. 280 (1990), *with Luck v. Southern Pacific*, 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990).

Under California law, whether there has been an invasion of privacy depends, in part, on the "reasonable expectations" of the parties. *Deborah C.*, 30 Cal. 3d 125, 137, 635 P.2d 446 (1981). The parties dispute whether, under California law, a CBA is relevant to that determination. Petitioner pointed below to the fact that, of the many California cases discussing a right to privacy in the workplace, none relied on the existence or contents of a CBA or of any other contract, in deciding whether there was a reasonable expectation of privacy.[1] Respondent, for its part, insisted that a CBA would necessarily be a part of any determination of reasonable expectations, but it pointed only to *federal court* decisions finding preemption of California privacy claims as evidence of such a rule of state law.

C. Proceedings Below.

On March 23, 1988, petitioner filed this action in California Superior Court.[2] His complaint alleged that Chevron's search, and the search policy on which it was based, violated his right of privacy under the California Constitution. He

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[1] Indeed, the cases discussing the federal constitutional protections against drug-testing also proceed without the slightest reliance on the CBA's that cover those workplaces. *E.g.*, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Coppinger v. Metro North*, 861 F.2d 33 (2d Cir. 1988).

[2] This case was filed as a class action, and John Doe defendants were named under California procedure. However, because of the course of the litigation, which quickly focused on the preemption issue, the specific defendants were never identified and served. In this petition, Stikes alone is identified as "petitioner," and Chevron as "respondent."

further alleged that his discharge for refusing to be searched both contravened the public policy of the State of California and was an "unlawful business practice" under California Code Section 17200, and that Chevron's conduct was malicious and had intentionally inflicted emotional distress on him. All of these torts were based on Chevron's decision to search Stikes' car and to fire him for refusing to consent to that search. The claim made no reference to a CBA, was not predicated on anything in a CBA, and could have been litigated without ever construing the CBA.

Petitioner moved for a preliminary injunction to compel his reinstatement pending a decision on the merits. However, before a hearing could be held, respondent removed the case to the United States District Court for the Northern District of California, asserting that the complaint arose under federal law because the district court would have jurisdiction over it under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. Jurisdiction was based solely on the fact that respondent is a party to a CBA that regulates some of the terms and conditions of petitioner's employment, although it says nothing specific about Chevron's right to search employees or their cars. According to respondent, the existence of this agreement alone not only supported removal; but also validated the search policy and thus barred the State of California from giving petitioner the legal right not to be searched.

Petitioner moved to remand the case to state court. He pointed out that all of his claims were based exclusively on California law and that none of his California causes of action were based, in whole or even in part, on rights accorded him in the CBA. He acknowledged respondent's argument that his state law rights were waived by the CBA and also acknowledged that respondent was entitled to litigate that waiver argument. In response, petitioner argued first that California law did not recognize this waiver doctrine, and second that

Chevron's arguments constituted no more than a federal law defense to his state law claims, and hence were not a basis for federal question jurisdiction. Respondent, for its part, argued that the mere *possibility* of waiver meant that Stikes' rights under California law were "completely preempted" by section 301 of the LMRA, and that, therefore, the case arose under federal law and had been properly removed. The district court denied the motion to remand without stating any reasons.

Petitioner then moved to reconsider the remand issue, and also moved the district court to abstain from deciding whether federal law barred California's enforcement of its common law regulation of drug-testing, in order to permit the California courts to decide the unsettled questions of California law, such as whether petitioner's privacy claim was waivable. In that way, he contended, the federal courts could avoid addressing the validity of California's privacy law in light of federal law under section 301. Respondent opposed both reconsideration and abstention, and moved for summary judgment on the ground that petitioner's claims were entirely preempted by the CBA and section 301. Respondent argued that the preemption issue had necessarily been decided in its favor in the course of resolving the issue of federal jurisdiction and that there was no reason to revisit that issue. With respect to abstention, respondent contended that there was no reason to abstain because this case did not involve any questions of federal constitutional law, ignoring the fact that section 301, on which it relied, is a federal statute and that it comes into play only because, under the Supremacy Clause of Article VI of the United States Constitution, federal law, such as section 301, overrides inconsistent state law. Again the district court ruled against petitioner, denying both abstention and reconsideration, and again the court provided no opinion to explain its decision. Accordingly, it granted summary judgment, dismissing petitioner's state law claims on the

ground that they were completely preempted by section 301.

The court of appeals affirmed. It upheld removal by ruling that, when an employer asserts the defense of section 301 preemption, the issues of preemption and removal jurisdiction are the same -- that is, a case is removable whenever there is section 301 preemption. Pet. App. 6a-7a. Turning to what thus became the dispositive question of preemption, the panel correctly noted that section 301 preempts not only claims that are founded on rights created by a CBA, but also claims that are "substantially dependent" on a CBA. *Id.* 7a. The panel ruled that petitioner's privacy claims necessarily "substantially depend" on the CBA by focusing on the waiver defense raised by respondent, not the claims pleaded by petitioner. According to the court, petitioner's privacy claims depend on the CBA because privacy is a waivable right, and the courts would have to examine the CBA to decide whether there had been a waiver. *Id.* 8a. Moreover, California law makes privacy dependent on a person's "reasonable expectations" of privacy, and one of the many factors that go into a determination of any employee's "reasonable expectations" is the meaning of the employee's CBA. *Id.* 10a.

Finally, the court acknowledged that petitioner had asked the district court to abstain to allow the California courts to address the unanswered state law issues which are at the core of the case. However, the court refused to abstain on the ground that preemption does not rise to the level of a constitutional question that warrants abstention, and that, in any event, analysis of the CBA would be required whether the CBA came into the case through waiver (as two previous Ninth Circuit preemption opinions had held) or through a determination of the employee's reasonable expectations. *Id.* 12a.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions of This Court and of Other Circuits, and Presents Extremely Important Questions of Federalism.

Overview

The rulings below on jurisdiction, abstention and preemption are, taken individually, seriously at odds with decisions of this Court and those of other circuits. But the need for review is greatly magnified because, taken together, they have fundamentally altered the way in which state law claims will be litigated whenever an employer is subject to a CBA. Accordingly, the petition first discusses the combined impact of the rulings, and then explains how the rulings below individually conflict with other authority of this and other courts.

At the heart of the merits of this case are questions of state law: may the right of privacy be waived as a condition of employment; and, in deciding a privacy case in a union workplace, may or must a court consider the CBA, and to what extent? The questions presented for this Court's consideration, however, are not ones of state law. Rather, they raise the federal law issues of which forum -- federal or state court -- ought to resolve the questions of state law, along with whatever federal law issues may be implicated depending on the results of the state law inquiry, and whether it is possible to recognize the state's interest in protecting its citizens' privacy, while still honoring the principles of federal law that govern the interpretation, application and enforcement of CBA's.

The practical effect of the decision below is that state law rights of privacy, and indeed other state law rights, can never be asserted by unionized workers, regardless of whether there is actually a CBA surrendering those rights. Union

workers thus become second class citizens, stripped by federal law of any state law privacy protections and entitled to only those privacy protections that their unions obtain in collective bargaining. Indeed, the opinion below precludes the state courts even from determining, as a matter of state law, what role, if any, they would accord the CBA in assessing employee privacy claims, despite the fact that, under the court's analysis, both preemption *and* removal depend on assumptions about what the state courts would say if they did consider such a case. Although the Ninth Circuit did not assert these propositions, their truth may be seen by considering three hypothetical cases.

First, assume a CBA that, as reasonably construed, does not bear on privacy: (1) the company does not agree to any limit on its powers in the area of worker privacy, and (2) the union does not agree to allow the employer to do anything proscribed by the right of privacy. The question then is, how would the California right of privacy be enforced? It could never be litigated in state court because the employer could obtain removal and preemption merely by asserting (a) that the contract supports its action in some way, (b) that the court has to look at the CBA to decide whether it does in fact support the employer's position, (c) that the need to look preempts the state claim, and (d) that preemption takes the case out of state court. Nor could the state right be enforced in arbitration, because an arbitrator, on ascertaining that the CBA is silent on the question, would hold that he lacks the power to grant relief because his only job is to enforce the agreement. *Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960).

Second, assume (1) that the CBA's actual meaning tilts slightly in favor of the employer, (2) that California law would require a state court to give consideration to a CBA as one of many factors bearing on the reasonable expectation of privacy, but (3) that each and every one of the other factors

strongly favors the employee so that, if a court were empowered to weigh the CBA in the balance, it would plainly hold that there was nonetheless a reasonable expectation of privacy. Again, (a) the employee could not enforce his state law rights in state court because the case would be removed, (b) he would lose in federal court because of the broad view of preemption taken by the Ninth Circuit, and (c) if the union took the case to arbitration, the arbitrator, whose only job is to enforce the CBA, would have to rule against the employee because the CBA does not grant him a contract-based right, which is the only basis on which the arbitrator may rule in the employee's favor.

Third, assume that the CBA actually says that the employer must abide by all state privacy rights. Still, the employer could argue that it construes the CBA to mean something else, and that the case is removable because the courts must look at the CBA to learn whether the employer's argument is correct, and the claim is preempted because the presence of the CBA alone is determinative. In that case an arbitrator could protect the employee, because the CBA incorporates state law, but he could not award the same amount of relief that California deems necessary to deter wrongdoing and compensate victims of tortious discharge -- namely, full compensatory damages (not just back pay) and punitive damages in appropriate cases. In this hypothetical, the CBA grants rights that are parallel to state law, precisely the sort of case that *Lingle v. Norge*, 486 U.S. 399 (1988), holds is not preempted. Yet under the Ninth Circuit's analysis, the case is removable and the state claims are preempted.

The first two hypotheticals are not imaginary. Petitioner's union apparently regarded the first as an accurate description of the CBA here, *supra* at 4, and respondent never denied that the second was this case; rather, it argued that the question of what the CBA actually provides or whether the other factors outweigh it "has [no] bearing" on the question

of preemption. Respondent's Court of Appeals Brief, at 33. And the third hypothetical is simply a logical outgrowth of the first two. While the court of appeals discussed the various legal doctrines independently, it never confronted their combined impact.

On the other hand, petitioner's contentions here would provide the courts with mechanisms to vindicate the state interest in protecting its citizens in circumstances where the CBA, whatever the employer may contend it means, does not in fact provide the employer with a defense. Thus, if the case were not removable, the state courts would be able to determine whether, as a matter of state law, the CBA was relevant to the employer's defense and, if so, they would, like the federal courts, apply the principles of federal labor law to that defense, as the constitution requires them to do. Those principles, equally applicable in state and federal court, would include requiring contract questions to be arbitrated, where appropriate. Even if the case could be removed, abstention would allow the federal court to retain jurisdiction to ensure the application of federal labor law principles if the state court's resolution of the state law issue made it necessary to do so. And, regardless of the forum in which the federal law principles were applied, petitioner's preemption analysis would permit the courts to decide those elements of the claims and the defenses that do not depend on federal law, while leaving to federal labor law procedures -- either an arbitration or a judicial determination of "clear and unmistakable waiver" -- the decision about how the CBA bears on the case.

The Ninth Circuit ignored these suggested means by which courts could accommodate the federal and state interests that are at stake in cases such as this. Instead, while honoring the federal interests, the lower courts obliterated those of the states. But, beyond this overall result that seriously undermines principles of federalism, as we now

show, the rulings below also run counter to decisions of this Court and of other federal circuits. Accordingly, the Court should grant certiorari to prevent the gross and wholly unnecessary infringements of state power that were wrought by the decision below.

Removal

The court below treated the issue of preemption under section 301 and the right of removal to federal court as one and the same -- all cases in which section 301 preempts state law are removable, and hence the only significant question once removal is sought based on section 301 preemption is whether there is, in fact, preemption. In so holding, the court of appeals not only acted contrary to this Court's opinion concerning removal of cases based on alleged preemption by section 301 in *Caterpillar v. Williams*, 482 U.S. 386 (1987), but it ignored this Court's analysis of *Caterpillar* in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989).

In *Caterpillar*, employees sued under state law to enforce contracts which, they alleged, were formed by Caterpillar's promises, made to them individually, that they would not be laid off if the plant were closed. Although this Court affirmed the holding that the case was improperly removed, it unanimously rejected the Ninth Circuit's reasoning. *Id.* at 391 n.4. The Court ruled that, even though a court must determine whether a plaintiff's complaint, properly pleaded, is a federal or state claim, the plaintiff may opt to avoid federal jurisdiction by exclusive reliance on state law. *Id.* at 392. Even the doctrine of complete preemption does not rob a plaintiff of this right, so long as the state law claim is not substantially dependent on a CBA. Thus, the *Caterpillar* plaintiffs asserted a breach of *individual* employment contracts, and even if they could also have asserted claims under the CBA, as masters of their complaint, they were free not to do so. *Id.* at 394-395.

Because the complaint did not rely on a CBA, or even address the relationship between the individual contracts and the CBA, the claims did not arise under section 301, and the case could not be removed based on the doctrine of complete preemption. *Id.* at 395.

The Court then turned to Caterpillar's defense based on the rule of *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), which limits the extent to which employers may adopt individual contracts that are inconsistent with the CBA. The Court had previously said that complete preemption under section 301 does not apply when a suit merely "relates to" a CBA; it is only state suits to *enforce* a CBA that "arise under" section 301 and hence are removable. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983). Therefore, the Court held, even if the rule of *J.I. Case* might ultimately be applied so that the CBA superseded the rights that plaintiffs could otherwise have enjoyed under individual contracts, that federal law defense must be litigated in state court:

> [T]he presence of a federal question, even a section 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule . . .. [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.
>
> 482 U.S. at 398-399 (emphasis in original).

Caterpillar controls the removal issue here. As in *Caterpillar*, the plaintiff here alleges that his employer violated rights apart from those created by the CBA. As in *Caterpillar*, the employer defends on the ground that the CBA evis-

cerates the right that the plaintiff would otherwise enjoy. And, as in *Caterpillar*, the employer removed the case from state court on the theory that, because it asserts that the CBA negates petitioner's state law rights, and because the courts will have to examine the CBA in order to resolve this defense, the claim itself arises under section 301 and is removable. Accordingly, as in *Caterpillar*, the waiver defense does not transform the claim itself into a federal claim that is within a district court's original jurisdiction, and removal is improper.

The Tenth Circuit has followed *Caterpillar* by barring removal of state law claims based on the contention that they were waived in a CBA. *Plumbers Local 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889-890 (10th Cir. 1987); *accord*, *Miller v. Fairchild Industries*, 668 F. Supp. 461, 467 (D. Md. 1987) (defendant claimed that supplemental CBA released all claims in connection with plant closing). The Sixth Circuit has also held that the mere fact that, in addressing a defense based on an interpretation of a CBA, the state court might ultimately hold that a plaintiff's claim is preempted, does not warrant removal of that claim to federal court. *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1333-1334 and n.3 (6th Cir. 1989) (*en banc*) (case remanded even though interpretation of CBA might show absence of discriminatory animus). District court decisions in other circuits have reached that conclusion as well. *E.g.*, *Machinists Local 967 v. General Elec. Co.*, 713 F. Supp. 547, 554-555 (N.D.N.Y. 1989); *Glass Molders v. Wickes Cos.*, 707 F. Supp. 174, 178 (D.N.J. 1989). The decision below conflicts with each of these decisions, as well as with *Caterpillar* itself.

The court of appeals distinguished *Caterpillar*, saying that there this Court forbade removal because plaintiffs' claims "involved jobs outside the bargaining unit and were based on the argument that the CBA did not apply to plaintiffs at all." Pet. App. 9a. This distinction not only has the effect of confining *Caterpillar* to its facts, but is erroneous. In

Caterpillar the employer argued that plaintiffs there were suing on promises that had been made while they were in the bargaining unit, but this Court ruled that the distinction was "irrelevant to the removal question.... [The] state law claims might be preempted by the NLRA, but they would not be transformed into claims arising under federal law." 482 U.S. at 398 n.12. As for the fact cited by the court below -- that in *Caterpillar* the employees' claims "were based on the argument that the [CBA] did not apply," Pet. App. 9a -- petitioner, too, argues that the CBA does not preclude his privacy claim, just as the *Caterpillar* plaintiffs contended with respect to their contractual claims. The employers in both cases, of course, argued that it would be necessary to consider the CBA because the CBA could supersede the state law right, but this Court held that the question of whether the CBA was relevant had to be litigated in state court.

Nor can it matter, for jurisdictional purposes, whether the CBA enters the case through a "waiver" defense or because it is one of many factors that a court considers in determining whether there is a reasonable expectation of privacy. In either case, if petitioner presented his evidence showing a reasonable expectation of privacy but failed to mention the CBA, his case would not be dismissed for that reason. Rather, respondent would submit the CBA as part of its case. Accordingly, under either view of state law, it is *respondent* that raises the CBA as a defense, and the claim itself does not arise under state law, and hence the preemption argument must be made in the state court, to which this case should have been remanded.

The lower court also refused to apply *Oklahoma Tax Commission* because the facts of that case did not involve section 301. *See* Pet. App. 9a. But petitioner cited *Oklahoma Tax Commission*, not because of any factual similarity, but because of the way it characterized *Caterpillar*, which was at odds with the way the Ninth Circuit has understood the case.

Thus, in *Oklahoma Tax Commission*, this Court described *Caterpillar* as a case in which:

> We refused to characterize these state law claims as arising under federal law even though an interpretation of the collective bargaining agreement might ultimately provide the employer a complete defense to the individual claims, and even though employee claims on the collective bargaining agreement would have been the subject of original federal jurisdiction.
>
> 489 U.S. at 841.

Similarly, here, even if the CBA were to provide respondent with a complete defense against Stikes' privacy claims, the privacy claims do not arise under federal law.

In both *Franchise Tax Board* and *Caterpillar*, this Court unanimously corrected the Ninth Circuit's misstatements of the law of removal based on preemption. Not only has the Ninth Circuit now refused to accept this Court's characterization of its own holding in *Caterpillar*, but in a line of cases stretching back to the year *Caterpillar* was decided, *e.g.*, *Young v. Anthony's Fish Grottos*, 830 F.2d 993 (9th Cir. 1987), that court has essentially disregarded *Caterpillar* by confining it to its facts.

The court below felt free to disregard *Oklahoma Tax Commission*'s analysis because the Ninth Circuit had analyzed *Caterpillar* before *Oklahoma Tax Commission* was decided, and the treatment of *Caterpillar* in the latter case was seen as mere dictum. Our suggestion of rehearing *en banc* sought to correct these abuses, but it was denied without opinion ten weeks after it was filed. At this point, only this Court can rescue litigants in the Ninth Circuit from the persistent refusal of the court below to come to terms with

Caterpillar. We urge the Court to grant certiorari to bring that court back into line with the law of federal jurisdiction.[3]

Preemption

The court below also held that the possibility that a CBA might be relevant, under state law, to the question whether state privacy rights were waived, operated as a complete bar to even the attempt to litigate those state law privacy claims. That ruling is also contrary to the reasoning of several other circuits, as well as to the discussion of cases involving questions of both state and federal law in *Lingle v. Norge*, 486 U.S. 399 (1988). Accordingly, certiorari should be granted to consider this question as well.

Section 301 assigned the development of a federal common law of CBA's to the federal courts, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Petitioner recognizes that the application of state contract law to determine the

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[3] If federal courts had jurisdiction over claims such as petitioner's, the abstention doctrine would provide yet another way in which the federal courts could ensure that the state courts had the final say on whether the CBA was relevant to the privacy issue under state law. Contrary to the holding of the court below that preemption is not a sufficient "constitutional" question to warrant application of the abstention doctrine, this Court has abstained to avoid the need to decide whether state law claims were preempted, *e.g.*, *AFL v. Watson*, 327 U.S. 582, 593-599 (1946); *see also Metlakatla Indian Cmnty. v. Egan*, 363 U.S. 555, 561-563 (1960), and other courts have done so as well. *Druker v. Sullivan*, 458 F.2d 1272, 1274 (1st Cir. 1972); *Street, Electric Railway Div. 1287 v. Dalton*, 206 F. Supp. 629, 634 (E.D. Mo. 1962) (three-judge court). Even the Ninth Circuit, in a decision cited by petitioner below but ignored by the panel, has held that federal labor law preemption questions should be avoided through abstention. *IBEW v. Public Serv. Comm.*, 614 F.2d 206, 213 (9th Cir. 1980).

meaning of CBA's would be inconsistent with the need for uniform principles of law to govern those agreements. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). This Court has also held that, when a plaintiff asserts a tort claim which turns on the contention that the defendant has violated either the CBA itself, or a duty assumed in the CBA, the principles of federal law must govern the enforcement of that claim despite the fact that the plaintiff denominates the claim as one in "tort" under state law, rather than as one in "contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (tortious breach of contractual duty); *IBEW v. Hechler*, 481 U.S. 851 (1987) (alleged duty assumed in CBA); *Steelworkers v. Rawson*, 110 S. Ct. 1904 (1990) (implied duty based on CBA). In such a case, the state law tort claim is "substantially dependent on analysis of the CBA." *Caterpillar*, *supra*, 482 U.S. at 394. But the Court has never done what the court below did here, *i.e.*, hold that a substantive state law granting important rights to employees is completely superseded by the mere existence of the CBA, without even examining its language or effect.

To the contrary, in *Lingle v. Norge*, 486 U.S. 399 (1988), this Court recognized that some CBA-related issues may have to be decided in the course of litigating state law claims, but that necessity did not preempt the underlying cause of action itself. Even the waiver issue raised in this case was anticipated in a footnote, where the Court noted the possibility that a state claim, which was nonwaivable under state law, might still be preempted because it was actually waived by the parties to a CBA. *Id.* at 409-410 n.9. According to this Court, before finding such a waiver and thus confronting the question whether it would override state law, "we would require 'clear and unmistakable' evidence, see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), in order to conclude that such a waiver had been intended." 486 U.S. at 410 n.9. The possible need to refer to the CBA did not preempt the

state law claims, as the panel here believed; nor did the Court say that the issue of whether a CBA waives state law involves the interpretation of a CBA that must be resolved by standard section 301 principles, *i.e.*, by an arbitrator. Instead, the Court indicated that waiver questions must be resolved by the courts -- "*we* would require 'clear and unmistakable' evidence." *Id.* (emphasis added).

The Court made a similar point when discussing the possible need to refer to a CBA in order to formulate a plaintiff's relief:

> Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise preempted, would stand. Thus, *as a general proposition*, a state law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby preempted.
>
> 486 U.S. at 413 n.12 (emphasis added).

Since *Lingle* was decided, the lower courts have wrestled with the question how much "dependence" on a CBA is too much to avoid preemption, and how much a state law claim may require interpretation of a CBA, yet still permit the "separate state law analysis" to be litigated in court while deferring to federal law principles to interpret the CBA. Several other circuits have resolved this question in ways that are inconsistent with the Ninth Circuit's approach, which is that any need to look at a CBA is too much.

Thus, for example, in cases in other circuits involving

retaliatory discharges in violation of public policy, of the sort that this Court held was not preempted in *Lingle*, employers frequently claim that the real reason for the discharge was based on something that the contract expressly forbids, such as excessive absenteeism. In order to address this defense, the employee must show that the alleged contractual reason either does not exist or is a charade. In either event, the employer's assertion of the CBA responds to one of the elements of the employee's claim (*i.e.*, bad motive), but the circuits are unanimous that such reference to the CBA is not enough to preempt state law claims. *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir. 1989) (*en banc*) (handicap discrimination claim); *Pantoja v. Texas Gas & Transm.*, 890 F.2d 955, 959-960 (7th Cir. 1989) (claim of retaliation for earlier suit based on CBA); *Hanks v. General Motors*, 906 F.2d 341, 344 (8th Cir. 1990) (emotional distress claim); *see also Brown v. Holiday Stationstores*, 723 F. Supp. 396, 405-407 (D. Minn. 1989); *Machinists Local 967 v. General Elec. Co.*, 713 F. Supp. 547, 554-555 (N.D.N.Y. 1989). But, if the decision below is correct, the mere possibility that the CBA might undercut an element of the plaintiff's claim (here, the "reasonable expectation" of privacy), would be sufficient to require complete and automatic preemption of the state law claim.

The decision below is also contrary to decisions in other circuits that have allowed state law claims to go forward, despite the fact that the claim *could* be undermined by an interpretation of the CBA, where, after application of federal law principles, it is decided that the CBA, as correctly construed, does not actually undercut the state law claim. The Seventh Circuit, for example, has ruled that, if employers raise a defense that a CBA supersedes a state right enjoyed by employees generally, the CBA-related defense should be arbitrated, and then the state claim is to be considered if the arbitral result so allows. *Matter of Chicago, Milwaukee RR*

Co., 852 F.2d 960, 967-968 (7th Cir. 1988). *See also Dougherty v. Parsec*, 872 F.2d 766 (6th Cir. 1989) (after arbitrator decided CBA not violated, court could decide remaining tort issues); *Makray v. Sara Lee Corp.*, 736 F. Supp. 793, 798-800 (N.D. Ill. 1990) (court decided whether CBA waived state law rights, and found no preemption because CBA was too ambiguous to meet *Metropolitan Edison* standard for waiver).[4] A similar procedure should be used to assess respondent's contentions with respect to the CBA here. There is no reason to think that Congress intended to decree that a mere assertion that a CBA undercuts a state claim suffices to plunge that claim into a black hole from which it can never be considered.

Under the panel's holding, union employees are deprived of rights that state law accords to employees generally, even if, in fact, the CBA, as correctly construed, would not aid the employer's case. *See supra* 10-13. It is only the most poorly counseled employer who cannot find a way to bring a CBA-related consideration into a discharge case, and so the rule adopted by the court below could completely eviscerate the power of states to protect unionized employees.

Indeed, if the law of federal preemption is that any state law that takes cognizance of the CBA as one of many factors in deciding whether an employer has misbehaved is completely preempted, the result may be to discourage states from allowing their courts to take that factor into account, thus undercutting rather than advancing collective bargain-

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[4] Indeed, in *Machinists Auto. Trades Dist. Coun. 190 v. Utility Trailer Sales*, 141 Cal. App. 3d 80, 82-83, 190 Cal. Rptr. 98, *app. dism.*, 464 U.S. 1005 (1983), the court examined the record of the parties' negotiations and decided that there was no agreement about the applicability of the state law right at issue there. This Court's dismissal of the employer's preemption appeal for want of a substantial federal question is binding precedent here.

ing over such issues. Because there is no reason to believe that Congress intended to preempt completely all state law where a CBA might, but also might not, undercut the state law claim, and because other courts have reached different conclusions about how *Lingle* ought to be applied in such circumstances, the Court should grant certiorari to review the preemption question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated, *Plaintiff-Appellant,* v. CHEVRON USA, INC., a Pennsylvania Corporation; and DOES 1 through 50, inclusive, *Defendants-Appellees.*	No. 89-15208 D.C. No. CV-88-1476-CAL OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
April 20, 1990—San Francisco, California

Filed September 17, 1990

Before: Procter Hug, Jr. and Mary M. Schroeder, Circuit Judges, and James A. von der Heydt,* District Judge.

Opinion by Judge Schroeder

*Honorable James A. von der Heydt, Senior United States District Judge for the District of Alaska, sitting by designation.

SUMMARY

Constitutional Law/Labor

Affirming a district court grant of summary judgment, the court of appeals held that the Labor Management Relations Act preempted a state cause of action for violation of an employee's right to privacy under the California Constitution.

Appellant David Stikes' refused to submit to a search of his private automobile parked on company property of his employer. An existing collective bargaining agreement between the employer and a union stressed the importance of safe work conditions, and provided that the employer would consider safety suggestions made by the union and the employees and that the union would encourage its members to cooperate with the safety program. As part of its safety program, the employer required its employees to submit to random searches of their persons and property. When Stikes refused to submit to the search of his automobile, the employer discharged him. Stikes filed suit in state court alleging infringement of his right to privacy under the California Constitution, wrongful discharge in violation of public policy, intentional infliction of emotional distress, and unfair business practices. After the employer removed the action to federal court, Stikes moved for remand on the theory that his complaint stated causes of action based solely on state law precluding federal jurisdiction. The district court denied this motion and another for federal abstention until the California courts could determine whether the right to privacy could be waived by a collective bargaining agreement. Summary judgment was granted for the employer.

[1] Supreme Court precedent directs that section 301 of the LMRA preempts state law claims that are founded on rights created by a collective bargaining agreement, or that are sub-

stantially dependent on analysis of a collective bargaining agreement. [2] Ninth Circuit case law expressly holds that in a suit by an employee against an employer for violation of privacy interests protected by the California Constitution, a determination of the claim would substantially depend upon an analysis of the collective bargaining agreement and would, therefore, be preempted by the LMRA. [3] Stikes' right to privacy claim was inextricably intertwined with the collective bargaining agreement. [4] The district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement. Neither could that court assess whether the employer's search of the car constituted an unreasonable intrusion without understanding the scope of the employer's powers under the collective bargaining agreement. [5] The court of appeals has expressly declined to construe California's privacy guarantee as a non-waiveable right. [6] Abstention was not appropriate because, even if the California courts found the privacy right non-waiveable, the right is not absolute, and its scope would involve consideration and possible interpretation of the collective bargaining agreement.

COUNSEL

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C. Douglas Floyd, Pillsbury, Madison and Sutro, San Francisco, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Chevron, USA terminated David Stikes' employment with Chevron after Stikes refused to permit his employer to search

his car that was parked in the company parking lot. Stikes appeals the district court's order denying his motions to remand and to abstain, and granting summary judgment in favor of his former employer, Chevron, USA. The district court held that Stikes' claims of violation of his right to privacy, wrongful discharge in violation of public policy, intentional infliction of emotional distress, and unfair business practices were completely preempted by section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 (1988), and hence were properly removable to federal court and subject to summary judgment on the merits. We affirm.

FACTS AND PROCEEDINGS BELOW

Stikes was employed by Chevron as a maintenance worker from June 1983 until July 1987. The conditions of his employment were governed by a collective bargaining agreement (CBA) which recognized Chevron's right to manage, direct and determine its work force as well as to demote or discharge any employee for cause. The CBA also stressed the importance of safe work conditions and provided that Chevron would consider safety suggestions made by the Union and the employees and that the Union would encourage its members "to cooperate with the Safety Program."

In September of 1984, Chevron instituted a policy as part of its safety program requiring its employees to submit to random searches of their persons and property. Pursuant to this policy, on July 2, 1987, Chevron's security chief ordered Stikes to submit to a search of his private vehicle which was parked on company property. Stikes refused to submit to the search, whereupon Chevron discharged him.

Stikes filed a suit in state court alleging that Chevron was liable for (1) infringement of his right to privacy in violation of Article 1, section 1 of the California Constitution; (2) wrongful discharge in violation of public policy; (3) inten-

tional infliction of emotional distress; and (4) unfair business practices. Chevron removed the action to federal district court. Stikes moved for remand on the theory that his complaint stated causes of action based solely on state law and that therefore no federal question jurisdiction existed.

The district court denied Stikes' motion on the ground that Stikes' state law claims were completely preempted by section 301 of the LMRA, 29 U.S.C. § 185, because the resolution of Stikes' right to privacy and attendant claims required interpretation of the CBA. Stikes also moved for abstention, asserting that the district court should await a determination by the California courts as to whether under California law, the right to privacy could be waived by a collective bargaining agreement. The district court denied this motion as well. The district court then granted Chevron's unopposed motion for summary judgment on the ground that Stikes' claims were preempted under section 301. This appeal followed.

DISCUSSION

The principal issue before us is whether Stikes' cause of action for interference with his State of California constitutional right to privacy is completely preempted by section 301 of the LMRA and therefore removable to federal district court.

Ordinarily, a defendant may remove a suit to federal court only if the suit could have been brought there originally. 28 U.S.C. § 1441(a)(1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 641 (9th Cir. 1989); *Hyles v. Mensing*, 849 F.2d 1213, 1215 (9th Cir. 1988). Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of [a plaintiff's complaint]." *Caterpillar*, 482 U.S. at 392. A federal defense, including the defense of preemption, may not form the basis of federal jurisdiction, "even if both parties concede that the federal

defense is the only question truly at issue." *Id.* at 2430 (citations omitted); *see Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 109 S. Ct. 1519, 1521 (1989).

The complete preemption doctrine, however, provides an exception to the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393; *Whitman v. Raley's, Inc.*, 886 F.2d 1177, 1180-81 (9th Cir. 1989); *Jackson*, 881 F.2d at 641. Under that doctrine

> The pre-emptive force of a statute [may be] so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim . . . .

Caterpillar, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)(footnote omitted)).

Section 301 of the LMRA is an example of a statute which has such a powerfully preclusive effect. *Caterpillar*, 107 S. Ct. 2430; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *Jackson*, 881 F.2d at 642. It confers jurisdiction in the district courts of the United States over "suits for violation of contracts between an employer and a labor organization representing employees. . . ."[1] 29 U.S.C. § 185(a). Its preemptive force is so powerful that it displaces entirely any state cause of action for violation of a collective bargaining agreement.

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[1]Section 301(a) of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

29 U.S.C. § 185(a).

Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 23 (1983).

Many suits by employees against employers are not in the form of suits for breach of the collective bargaining agreement, yet may nonetheless implicate provisions of the agreement. This has given rise to some thorny jurisdictional questions. *See generally* Note, *Preemption of State Law Claims After Lingle v. Norge*, 34 Vill. L. Rev. 1035, 1050-58, 1071-77 (1989)(authored by Michelle Smith Nofer).

[1] During the past decade, the Supreme Court has handed down a number of decisions defining the scope of section 301's preemptive effect. At least two principles have emerged. First, section 301 preempts state law claims which are founded on rights created by a collective bargaining agreement. *Caterpillar*, 482 U.S. at 394; *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 198 (9th Cir. 1989); *see, e.g., United States v. Rawson*, 110 S. Ct. 1904, 1909-11 (1990); *International Brotherhood of Elec. Workers v. Hechler*, 481 U.S. 851, 861 (1987); *Allis-Chalmers*, 471 U.S. at 220. Second, section 301 preempts state law claims which are " 'substantially dependent on analysis of a collective bargaining agreement.' " *Caterpillar*, 482 U.S. at 394 (quoting *Hechler*, 481 U.S. at 859 n.3); *accord, Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 410 (citations omitted); *Gulden*, 890 F.2d at 198.

[2] In order to determine whether Stikes' state law claim of privacy substantially depends upon an interpretation of the collective bargaining agreement, we must examine the elements of that claim to ascertain if any of the elements require a construction of the agreement. *See Lingle*, 486 U.S. at 405-410; *Gulden*, 890 F.2d at 198-99; *Tellez v. Pacific Gas and Elec. Co., Inc.*, 817 F.2d 536, 539 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987); *see also, Sluter v. United Mine Workers of America*, 892 F.2d 549, 553 (7th Cir. 1989); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 116-119 (1st Cir. 1988), *cert.*

denied, 109 S. Ct. 3158 (1989). Two recent Ninth Circuit decisions, like this case, involve suits by an employee against an employer for violation of privacy interests protected by the California Constitution. In both cases we expressly held that a determination of a claim based on the California right to privacy would substantially depend upon an analysis of the collective bargaining agreement and would therefore be preempted. *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Utility Workers of America v. Southern California Edison Co.*, 852 F.2d 1083, 1085-87 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1530 (1989). *Laws* and *Utility Workers* both involved challenges to an employer's imposition of a drug and alcohol testing program. In *Laws*, a plaintiff employee refused to submit to a urine test and was suspended. The employee alleged that the drug program and his subsequent suspension violated his California constitutional right to privacy. We found Laws' claim subject to removal from state court on preemption grounds. We reasoned that a drug and alcohol testing program is a working condition "whether or not it is specifically discussed in the CBA." *Laws*, 852 F.2d at 433. We further noted that Laws' state law claim arose out of his suspension, an issue covered by the collective bargaining agreement. *Id.* In *Utility Workers*, 852 F.2d at 1086, we considered whether the California Constitution created a nonnegotiable right to privacy such that resolution of the privacy claim might not involve the CBA. We concluded that "drug testing does not implicate the sort of 'nonnegotiable state law rights' that preclude preemption under section 301." *Id.* (citation omitted). Rather, "an employer's decision to institute a drug testing program is a proper subject for collective bargaining." *Id.* *Laws* and *Utility Workers* require us to find Stikes' privacy claim preempted.

Stikes asks us to revisit our *Laws* and *Utility Workers* decisions in light of the Supreme Court's recent holding in *Oklahoma Tax Commission*, 109 S. Ct. at 1519. That case involved a state's action against an Indian tribe to recover excise taxes. The tribe removed the case to federal district

court, asserting federal question jurisdiction on the ground that the suit was barred by tribal sovereign immunity. The Supreme Court found the action not properly removable because the federal question appeared in the defense and not on the face of the plaintiff's well-pleaded complaint.

Oklahoma is inapposite to the case at bar because it does not involve an area of federal law subject to the complete preemption corollary to the well-pleaded complaint rule. Stikes argues that *Oklahoma* nonetheless requires a modification of *Laws* and *Utility Workers* because it relied upon the Supreme Court's prior holding in *Caterpillar*, a case which did involve an issue of section 301 preemption. *Caterpillar* held that an employee's state law claims were not subject to removal "even though an interpretation of the collective bargaining agreement might ultimately provide the employer a complete defense to the individual [state] claims . . . ." *Id.* at 1521 (citing *Caterpillar*, 482 U.S. at 396-98). The Court found removal inappropriate in *Caterpillar* because plaintiffs' claims in that case involved jobs outside the bargaining unit and were based on the argument that the collective bargaining agreement did not apply to plaintiffs at all. *Caterpillar*, 482 U.S. at 388-89, 394-95. In *Laws*, 852 F.2d at 433-34, we expressly considered the effect of *Caterpillar* upon removal of a claim based on California's constitutional right to privacy. Laws, like Stikes here, argued that the employer in that case could not remove a state privacy claim to federal court based on a federal defense of preemption. We rejected Laws' argument on the ground that unlike the claims of the employees in *Caterpillar* who asserted rights based upon individual employment contracts outside the scope of the collective bargaining agreement, Laws' right to privacy claim was not "wholly separate from the CBA" but rather was "inextricably intertwined" with it because it involved a working condition. *Id.* (citing *Allis Chalmers*, 471 U.S. at 213).

[3] Stikes' right to privacy claim is inextricably intertwined with the collective bargaining agreement. This is because a

violation of California's constitutional right to privacy requires both that an individual have a "personal and objectively reasonable expectation of privacy" and that the expectation "has been infringed by an unreasonable . . . intrusion." *Alarcon v. Murphy*, 201 Cal.App.3d 1, 5, 248 Cal. Rptr. 26, 29 (Ct. App. 1988); *see In re Deborah C.*, 30 Cal. 3d 125, 137, 177 Cal. Rptr. 852, 635 P.2d 446 (1981); *Chico Feminist Women's Health Center v. Scully*, 208 Cal.App.3d 230, 240-42, 256 Cal. Rptr. 194, 199-200 (Ct. App. 1989); *People v. Superior Court(Safeco Insur. County)*, 61 Cal.App.3d 584, 588, 594, 210 Cal. Rptr. 695, 703-04 (Ct. App. 1985); *Armenta v. Superior Court of Santa Barbara County*, 132 Cal. Rptr. 586, 588, 592 (Ct. App. 1976). *See also Flesh v. Board of Trustees of Joint School Dist. 2*, 786 P.2d 4, 8-9 (Mont. 1990)(to "determine whether a privacy interest is protected under the [Montana] State Constitution, we apply a two-part test: (1) whether the person involved had a subjective or actual expectation of privacy; and, (2) whether society is willing to recognize that expectation as reasonable." (citations omitted)).

[4] Here, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement. *See In re Deborah*, 30 Cal. 3d at 137 ("What constitutes a 'reasonable' expectation of privacy depends on the circumstances and is measured by common habits in the use of domestic and business properties." (citations omitted)). By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement.

Other circuits have similarly concluded that section 301 preempts state invasion of privacy claims. In *Liquid Carbonic*, 863 F.2d at 118, the First Circuit held that an employee's claim that his employer's drug testing program violated his statutory right to privacy depended upon whether the test-

ing was reasonable in light of the circumstances. This necessitated an interpretation of the CBA because the CBA defined the dimensions of the employee's "cognizable expectation of privacy." *Id.* at 118-19. In *Kirby v. Alleghany Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), an employee brought a state invasion of privacy claim against his employer based on his employer's search of his person and request to search his automobile. The Fourth Circuit determined that the analysis of the employee's claim would require reference to the CBA to ascertain whether the employer's actions were reasonable in light of that agreement. *Id.* at 255-56. Thus, unlike the CBA in *Caterpillar*, the CBA here does not provide a defense to Stikes' invasion of privacy claim. Rather, it is part and parcel of the prima facie claim itself, subjecting that claim to federal jurisdiction.

[5] Stikes next contends that the California right to privacy is not negotiable and cannot be affected by a collective bargaining agreement. We have expressly declined to construe California's privacy guarantee as a non-waiveable right. *Utility Workers*, 852 F.2d at 1086. Stikes distinguishes that case on the ground that *Utility Workers* involved drug testing as opposed to a random search of an employee's automobile, suggesting that the privacy interests here are more compelling. The distinction cuts the other way. If anything, a urine analysis or similar search of a person's body constitutes a far greater intrusion of privacy than a car search. Furthermore, even if California courts were to deem the right to privacy nonnegotiable in the collective bargaining process, suits based upon a violation of that right might nonetheless fall within section 301's preemptive grip. As the Supreme Court explained in *Lingle*

> While it may be true that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a State could create a remedy that,

> although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301.

486 U.S. at 407-08 n.7.

Stikes' privacy claim was completely preempted by section 301 and properly dismissed on the merits. Appellant's remaining claims of wrongful discharge, intentional infliction of emotional distress and unfair business practices are peripheral to the privacy claim. Stikes does not argue that they should be independently remanded if we agree with the district court and find the privacy claim completely pre-empted. *See Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 844-45 (9th Cir. 1989)(section 301 preempted the gravamen of plaintiff's complaint and therefore preempted parasitic claims dependent upon that claim as well).

[6] Appellant's final contention on appeal is that the district court should have abstained from deciding the federal pre-emption issue under the Pullman Abstention Doctrine. The Pullman Abstention Doctrine prevents federal courts from unnecessarily deciding constitutional questions. *Railroad Comm. v. Pullman*, 312 U.S. 496, 499-500 (1941). The question of section 301 preemption does not rise to the level of a constitutional question in abstention jurisprudence. *Cf. Knudsen Corp. v. Nevada State Dairy Comm.*, 676 F.2d 374, 377 (9th Cir. 1982). *See generally* C. Wright, *The Law of Federal Courts* 303-308 (4th ed. 1983). Appellant nevertheless reasons that if the California courts were to deem the right to privacy nonnegotiable, the federal courts would not have to address the question of whether the LMRA preempts the privacy right. The right to privacy under California law, however, is based in major part upon the parties' reasonable expectations and these, of necessity, involve the working conditions agreed upon in the collective bargaining agreement. Thus, even if the California courts were to find the privacy

right non-waiveable, the right is not absolute and its scope would involve consideration and possible interpretation of the collective bargaining agreement. Pullman Abstention, therefore, is not appropriate for this reason as well and the district court properly refused to abstain.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated, Plaintiff, v. CHEVRON U.S.A., INCORPORATED, a Pennsylvania corporation; and DOES 1 through 50, inclusive, Defendants.	)	No. C-88-1476-CAL

ORDER

Plaintiff has moved to remand the action to state court. The court has reviewed the moving and opposing papers, the record in the case, the arguments of counsel, and the applicable authorities.

IT IS ORDERED that:

1. Plaintiff's motion for remand is denied.

2. A status conference will be held in this case and in case No. C-88-1000 on September 23, 1988, at 11:00 a.m.

Dated: August 8, 1988.

/s/
CHARLES A. LEGGE
UNITED STATES
DISTRICT JUDGE

United States District Court
Northern District of California

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated, Plaintiff, vs. CHEVRON U.S.A., INCORPORATED, a Pennsylvania corporation; and DOES 1 through 50, inclusive, Defendants.	No. C 88 1476 CAL ORDER DENYING PLAINTIFF DAVID STIKES' MOTIONS (1) FOR RECONSIDERATION AND (2) FOR ABSTENTION

Plaintiff's motions (1) for reconsideration of order denying motion for remand or, in the alternative, for certification of order for interlocutory appeal, and (2) to abstain, came on regularly for hearing before the Honorable Charles A. Legge on November 4, 1988, both plaintiff and defendant appeared through their counsel of record. The Court, having reviewed the papers filed in support of and in opposition to said motions, and having heard the argument of counsel, and upon proof being made to the satisfaction of the Court,

Hereby ORDERS, that said motions be, and the same hereby are, denied.

Dated: January ___, 1989.

JAN 16 1989 CHARLES A. LEGGE

Judge of the United States
District Court

United States District Court
Northern District of California

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated, Plaintiff, vs. CHEVRON U.S.A., INCORPORATED, a Pennsylvania corporation; and DOES 1 through 50, inclusive, Defendants.	No. C 88 1476 CAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT THEREON

The motion of defendant CHEVRON U.S.A. INC. for an order granting summary judgment in its favor upon the complaint filed herein, came on regularly for hearing on November 9, 1988 and January 13, 1989, before the Honorable Charles A. Legge of the United States District Court for the Northern District of California. Pillsbury, Madison & Sutro appeared as counsel for said defendant, and Robert N. Jacobs appeared on behalf of plaintiff David Stikes.

The Court, having examined the written memoranda of counsel, the Declaration of T. M. Boyle and the pleadings on file in this action, and having heard the arguments of counsel, and upon proof being made to the

satisfaction of the Court.

Hereby ORDERS that the motion of defendant Chevron U.S.A. Inc. for summary judgment in its favor upon the complaint be, and the same hereby is, granted.

Pursuant thereto,

It is further ORDERED, ADJUDGED and DECREED that judgment be entered in favor of defendant Chevron U.S.A. Inc. and against plaintiff David Stikes as prayed for in the answer of said defendant to the complaint on file in this action and that said defendant recover its costs of suit herein.

Dated: JAN 19 1989

CHARLES A. LEGGE
Judge of the United States
District Court

FILED
DEC 12 1990
CLERK, U.S. COURT
OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated, Plaintiff-Appellant, v. CHEVRON USA, INC., a Pennsylvania Corporation; and Does 1 through 50, inclusive, Defendants-Appellees.	No. 89-15208 D.C. # CV-88-1476-CAL (Northern California) ORDER

Before: Judges HUG and SCHROEDER, Circuit Judges, and VON DER HEYDT,* District Judge.

* Honorable James A. von der Heydt, Senior United States District Judge for the District of Alaska, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

No. 90-1431

FILED
APR 15 1991
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,
Petitioners,

v.

CHEVRON U.S.A. INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Is a claimed invasion of the California right of privacy based on a workplace search completely preempted by section 301 of the Labor Management Relations Act (29 U.S.C. § 185) where resolution of that claim is inextricably intertwined with the terms of the applicable collective bargaining agreement relating to the workplace rights and duties of the parties?

AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 29.1, respondent identifies the following as its parent corporation and subsidiaries (except wholly owned subsidiaries):

Chevron Corporation (parent)

Mozambique Gulf Oil Company (subsidiary).

In addition, respondent has an ownership interest in the following publicly traded companies:

Felix Oil Company

Horizon Gold Corporation.

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No. 90-1431

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,
Petitioners,

v.

CHEVRON U.S.A. INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner, David Stikes, was employed by Chevron as a maintenance worker at Chevron's Kettleman Hills production facility. At all times during the course of that employment, petitioner was represented by the International Union of Petroleum and Industrial Workers ("IUPIW"). The terms and conditions of his employment were established by a collective bargaining agreement between the IUPIW and Chevron. Pet. App. 4a.

Chevron had a written policy prohibiting unauthorized drugs, intoxicating beverages, firearms or other weapons at its Kettleman Hills facility. The policy provided that, as a safety precaution and to prevent theft of property, all persons and vehicles brought onto Company property were subject to search. Pet. App. 4a; Supp.ER 12.[1] The policy expressly provided that employees who refused to comply with a search request would be subject to discipline, up to and including discharge. Ibid. Petitioner acknowledged in writing having received and read a written notice of this policy. Ibid.

On July 1, 1987, in response to the discovery of what appeared to be drug paraphernalia in a Company-owned vehicle, Chevron conducted a security inspection of its employees at Kettleman Hills in accordance with its published policy. Pet. App. 4a; ER 55, ¶ 13; 56, ¶ 18. Petitioner, while permitting a search of his lunchpail, locker, and pockets, refused to permit Chevron's security representative to inspect his vehicle, which was parked on Company property. Id.; ER 55, ¶ 16. As a result, petitioner was terminated from employment.

The collective bargaining agreement recognizes Chevron's right to manage, direct and determine its workforce and to demote or discharge an employee for cause, and acknowledges the recognition of both Chevron and the IUPIW that safe working conditions and practices are essential in the prevention of personal injury and damage to equipment. Pet. App. 4a; Agreement (Supp.ER 18-82), Arts. II.C, IX.B, XX.A. In addition, the union agreed to encourage its members to work in a safe manner and "to cooperate with the Safety Program." Art. XX.A. The agreement also provides employees or the union with a three-step grievance procedure that culminates in binding third-party arbitration for the purpose of settling disputes. Arts. VII and VIII. A "just cause provision" of the agreement permits employees to protest a demotion or discharge. Art. I X.B.[2]

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[1] References to the ER and the Supp.ER are to the Excerpts and Supplemental Excerpts of Record filed in the court of appeals.

[2] Here the union did initiate a grievance on petitioner's behalf shortly after his discharge, and pursued it through the first two stages, but

B. Proceedings Below.

1. On March 23, 1988, petitioner filed an action against Chevron and the IUPIW in the United States District Court for the Northern District of California under section 301 of the Labor Management Relations Act ("LMRA") and the National Labor Relations Act, 29 U.S.C. § 151, et seq. (No. C 88 1000 CAL), in which he alleged that "Chevron's conduct, both in unilaterally promulgating its search-and-seizure policy and in firing David Stikes for refusing to submit to a search of his car pursuant to this policy, is in violation of the terms of the collective bargaining agreement attached hereto as Exhibit A." Supp.ER 9-10, ¶ 28. The complaint also states a claim against the IUPIW for breach of its duty of fair representation and an unfair labor practice. Supp.ER 10, ¶ 29. That action was stayed pending the Ninth Circuit's decision in the present case, and remains pending in the district court.

On the same day that he filed his federal section 301 action claiming that his discharge violated the collective bargaining agreement, petitioner filed the present action against Chevron in California state court alleging that the search and his subsequent discharge violated his right of privacy under Article I, section 1, of the California Constitution.[3] On April 22, 1988, Chevron removed petitioner's state court action to the United States District Court for the Northern District of California on the ground that petitioner's state claims were completely preempted by section 301 of the LMRA. The district court denied petitioner's motion for remand. The court then granted Chevron's motion for summary judgment on the ground that the action should be dismissed as completely preempted by federal law.

2. The court of appeals affirmed. The court explicitly recognized that, under this Court's decisions in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) and *Oklahoma Tax Commission*

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abandoned it before the final, binding arbitration stage was concluded. Supp.ER 2, ¶ 1: 10, ¶ 29; 83; 84.

[3] Petitioner also alleged other state law theories that, as the court of appeals held, were dependent on the disposition of his privacy claim. Pet. App. 12a.

v. Graham, 489 U.S. 838 (1989), "[a] federal defense, including the defense of preemption, may not form the basis of federal jurisdiction * * *." Pet. App. 5a. The court also recognized, however, that under the "complete preemption" doctrine, " 'the preemptive force of a statute [may be] so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule" ' " (id. at 6a, quoting *Caterpillar*, supra, 482 U.S. at 393), and that "section 301 of the LMRA is an example of a statute which has such a powerfully preclusive effect" (id. at 6a).

The court of appeals noted that this Court's decisions establish that section 301 completely preempts state law claims *either* that are founded on rights created by a collective bargaining agreement, *or* "which are 'substantially dependent on analysis of a collective bargaining agreement' " (id. at 7a, quoting *Caterpillar*, 482 U.S. at 394), and that to determine whether a claim substantially depends upon an interpretation of the collective bargaining agreement, "we must examine the elements of that claim to ascertain if any of the elements require a construction of the agreement" (id. at 7a).

The court then examined the elements of petitioner's privacy claim. It noted that in two previous decisions it had held that "a determination of a claim based on the California right to privacy would substantially depend upon an analysis of the collective bargaining agreement and would therefore be preempted." Id. at 8a.[4] The court concluded that petitioner's privacy claim "is inextricably intertwined with the collective bargaining agreement" because "a violation of California's constitutional right to privacy requires both that an individual have a 'personal and objectively reasonable expectation of privacy' and that the expectation 'has been infringed by an unreasonable * * * intrusion.' " Id. at 9a-10a.

> "Here, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the

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[4] *Utility Workers of America, Local 246 v. Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), certiorari denied, 489 U.S. 1078 (1989); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988).

> conditions of his employment enumerated in the collective bargaining agreement. *See In re Deborah*, 30 Cal.3d at 137 ('What constitutes a "reasonable" expectation of privacy depends on the circumstances and is measured by common habits in the use of domestic and business properties.' (citations omitted)). By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement." Id. at 10a.

As the court also recognized, the complete preemption issue presented in this case is fundamentally different from that in *Caterpillar*, because "unlike the CBA in *Caterpillar*, the CBA here does not provide a *defense* to Stikes' invasion of privacy claim. Rather, it is *part and parcel of the prima facie claim itself*, subjecting that claim to federal jurisdiction." Id. at 11a (emphasis added).

REASONS WHY THE PETITION SHOULD BE DENIED

In an effort to create an issue worthy of this Court's attention where none exists, the petition misstates the issues, mischaracterizes the opinion of the court of appeals, and misconstrues this Court's decisions considering the preemptive force of section 301. On the only issue presented—whether a claim that a *workplace* search violates the California right of privacy is substantially dependent on the provisions of the applicable collective bargaining agreement—there is no conflict among the circuits and no inconsistency with any decision of this Court. Nor does this case present any "extremely important question of federalism." Pet., p. 10. It is petitioner, not the Ninth Circuit, who has misunderstood and "disregarded" (Pet., p. 18) this Court's decisions and the reasons why the removal and subsequent dismissal of petitioner's complaint were clearly correct.

1. As the court of appeals recognized, section 301 of the LMRA is the leading example of a federal statute whose preemptive force is so extraordinary that it completely preempts both state law claims that are founded directly on rights created by a

collective bargaining agreement *and* those that are " 'substantially dependent on analysis of a collective bargaining agreement.' " *Caterpillar*, supra, 482 U.S. at 393-394, quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1987). Contrary to plaintiff's erroneous contention that "only state suits to *enforce* a CBA * * * 'arise under' section 301 and hence are removable" (Pet., p. 15), it is settled beyond any possible question that "[i]f the policies that animate section 301 are to be given their proper range * * * the preemptive effect of section 301 must extend beyond suits alleging contract violations." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). As this Court reaffirmed in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988):

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute." Id. at 406.

Thus, section 301 preemption extends beyond contract disputes to a claim framed in terms of state tort law if resolution of the claim is "inextricably intertwined with consideration of the terms of [a] labor contract." *Allis-Chalmers Corp. v. Lueck*, supra, 471 U.S. at 213.

2. The petition is based entirely on the erroneous suppositions that the provisions in the collective bargaining agreement are irrelevant to the determination of petitioner's claim that his privacy rights were violated by a workplace search, that his privacy claim could have been litigated without considering the provisions of the collective bargaining agreement (Pet., p. 7), and that the collective bargaining agreement could be relevant, if at all, only "defensively" to determine whether it constituted a "waiver" of petitioner's privacy claim. Pet., pp. 5, 7, 8, 9, 10, 15, 16, 17, 18. As the court of appeals held, none of these assertions is correct. Petitioner's pivotal claim that a federal "defense" of "waiver" provides no basis for removal is beside the point. Removal in this case was not based on any alleged defense of

waiver, but on the fact that, under clearly established law, petitioner's *own claim for relief* cannot be resolved without careful analysis of the provisions of the collective bargaining agreement that necessarily have an important bearing on the scope and reasonableness of his workplace privacy expectations.[5]

3. California law could not be clearer that in determining whether the right of privacy has been violated, a court must consider all of the facts and circumstances bearing on the weight and significance of the interest in disclosure, on the one hand, and the intrusion on reasonable privacy expectations, on the other. Under California law, "the right to privacy is not absolute" (*People v. Stritzinger*, 34 Cal.3d 505, 511 (1983)), and depends upon "striking a balance" between the competing interests in disclosure and privacy under all of the circumstances. *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 657-658 (1975); see, e.g., *Doyle v. State Bar*, 32 Cal.3d 12, 21 (1982); *Loder v. Municipal Court*, 17 Cal.3d 859, 864 (1976), certiorari denied, 429 U.S. 1109 (1977). That balance turns in significant part on "whether a person has exhibited a *reasonable* expectation of privacy" in the particular circumstances. *Burrows v. Superior Court*, 13 Cal.3d 238, 243 (1974) (emphasis added). Accord, *People ex rel. Franchise Tax Bd. v. Superior Court*, 164 Cal.App.3d 526, 540 (1985) ("The basic test of whether there has been a violation of the constitutional right of privacy is whether a person's personal and objectively reasonable expectation of privacy has been infringed * * *"); *In re Deborah C.*, 30 Cal.3d 125, 137 (1981) ("[w]hat constitutes a 'reasonable' expectation of privacy *depends on the circumstances and is measured by common habits in the use of domestic and business properties*") (emphasis added); *Alarcon v. Murphy*, 201 Cal.App.3d 1, 5 (1988); *Armenta v. Superior Court*, 61 Cal.App.3d 584, 588 (1976). Cf. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is under-

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[5] Similarly, petitioner's assertion that the Ninth Circuit's decision found preemption based on the "mere existence" of a collective bargaining agreement (Pet., second question presented and pp. 7, 20) is specious.

stood to differ according to context"). And, foremost among the circumstances bearing on the strength and reasonability of the interests in privacy and disclosure in the context of a workplace search are the provisions of the applicable collective bargaining agreement.

4. Petitioner's assertion that the Ninth Circuit "focus[ed] on the [defense of] waiver * * * not the claims pleaded by petitioner" (Pet., p. 9) is clearly wrong. The court of appeals explicitly reaffirmed that removal may not be based solely on the existence of a federal preemption defense. Supra, p. 4. The point, rather, is that the collective bargaining agreement defines and governs the workplace relationship between the parties and therefore necessarily has an important bearing on the interests of the parties and the scope of the reasonable expectations against which any privacy rights enjoyed by petitioner are required to be measured. Pet. App. 9a-10a. The elements of plaintiff's own claim for relief therefore brought the provisions of the collective bargaining agreement into play. A court would have to interpret the agreement to determine the legitimate interests and expectations of Chevron and its employees and to draw the appropriate balance between them in the context of this workplace search.

5. The state claims in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) (Pet., pp. 14-16) arose in an entirely different context. The plaintiffs in *Caterpillar* filed an action in state court in which they elected to rely on contractual rights that arose while they were in non-union management positions and before they were demoted to positions covered by the collective bargaining agreement. The collective bargaining agreement was interjected into the suit only by way of the employer's defense—i.e., that after plaintiffs were demoted, the collective bargaining agreement somehow superseded any contract rights arising earlier. *Caterpillar*, supra, 482 U.S. at 394-397. By contrast, the *only* contract that governed petitioner's employment relationship with Chevron was the collective bargaining agreement. And because petitioner's affirmative claim for relief itself necessarily involved interpretation of that agreement, this action was properly removed, and subsequently dismissed, as completely preempted by section 301.

Petitioner's reliance on *Caterpillar* again rests on the mischaracterization of the issue as whether the collective bargaining agreement in this case constituted a "waiver" of plaintiff's privacy rights. However, as previously discussed, reference to the collective bargaining agreement is required in this case, not to resolve a defense, but to determine plaintiff's own claim for relief. As the court of appeals explained, "[h]ere, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement. * * * By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement." Pet. App. 10a.

6. Petitioner's further contention that the decision of the court of appeals would permit removal even if the collective bargaining agreement, properly construed, would not defeat the reasonable privacy expectations of the employee (Pet., pp. 11-12, 23, 25) misses the central point of this Court's section 301 preemption decisions. This Court has repeatedly held that any state law claim that is "substantially dependent" upon the *process* of construing a collective bargaining agreement is completely preempted by section 301, regardless of the outcome of that process, because of the overriding necessity for uniformity in the application of federal labor law. See, e.g., *Allis-Chalmers*, supra, 471 U.S. at 210, 213. In this case, to determine whether the collective bargaining agreement's provisions relating to the workplace rights and obligations of the employer and the employees do or do not strengthen or undermine the reasonable privacy expectations of the employees and the countervailing interest of the employer in disclosure, the provisions of the agreement must first be interpreted and applied.[6] Where a state law claim is substan-

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[6] This is well illustrated by petitioner's "hypotheticals" (Pet., pp. 11-12) that, alternatively, posit that the collective bargaining agreement "as reasonably construed" does not bear on privacy; that the agreement's "actual meaning tilts slightly in favor of the employer"; and that the agreement should be construed to require the employer to adhere to state privacy protections. Pet., pp. 11, 12. Similarly, peti-

tially dependent on such a process, it is completely preempted. This does not leave the employee remediless or "completely eviscerate" (Pet., p. 25) protections of unionized employees. The employee's remedy instead lies under the provisions of the applicable collective bargaining agreement, as demonstrated by petitioner's pending federal action alleging that his discharge violated section 301. Supra, p. 3.[7]

Nor does the decision below in any way conflict with *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). Pet., pp. 19-21. To the contrary, *Lingle* explicitly reaffirms *Allis-Chalmers*' central premise—that preemption is dependent upon whether the asserted claim, regardless of how it is framed, must be resolved with reference to the collective bargaining agreement. 471 U.S. at 211. In *Lingle*, this Court found that resolution of plaintiff's claim of retaliatory discharge for filing a workers' compensation claim required no analysis of the collective bargaining agreement and, indeed, was completely " 'independent' of the collective bargaining agreement." 486 U.S. at 407. By contrast, in this case, the Ninth Circuit correctly concluded that the California privacy claim was "inextricably intertwined" with the CBA. Pet. App. 9a. While petitioner asserts (contrary to clear authority)[8] that California courts would hold that the right of privacy cannot be "waived " in collective bargaining, this Court in *Lingle* explicitly concluded that even where a right is claimed to be

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tioner's second "question presented" asserts that the Ninth Circuit's decision is erroneous because it finds preemption even though a court has not determined "the actual way in which the CBA applies to the specific conduct that forms the basis of the state law claim."

[7] Moreover, petitioner's exaggerated arguments disregard that under this court's decisions (and under the decision below), *only* claims that are substantially dependent on the terms of a collective bargaining agreement are preempted. All other state law protections and regulations of working conditions are unaffected.

[8] *Luck v. Southern Pacific Transportation Co.*, 218 Cal.App.3d 1, 28 (1990), certiorari denied 111 S.Ct. 344 (1990) (consent to drug testing under a CBA would be lawful); *Laws v. Calmat*, supra, 852 F.2d at 433; *Utility Workers of America v. Southern Cal. Edison*, supra, 852 F.2d 1086 (drug testing does not implicate "nonnegotiable state-law rights").

"non-negotiable," complete preemption still occurs where interpretation of the bargaining agreement is required for its determination. 486 U.S. at 408, n. 7. As the court of appeals in the present case correctly held in rejecting petitioner's *Pullman* abstention argument:

> "Appellant nevertheless reasons that if the California courts were to deem the right to privacy nonnegotiable, the federal courts would not have to address the question of whether the LMRA preempts the privacy right. The right to privacy under California law, however, is based in major part upon the parties' reasonable expectations and these, of necessity, involve the working conditions agreed upon in the collective bargaining agreement. Thus, even if the California courts were to find the privacy right non-waiveable, the right is not absolute and its scope would involve consideration and possible interpretation of the collective bargaining agreement. Pullman Abstention, therefore, is not appropriate for this reason as well and the district court properly refused to abstain." Pet. App. 12a-13a.

7. There is also no conflict in the circuits. As the Court of Appeals for the First Circuit recognized in an analogous case alleging an invasion of the Massachusetts privacy right, it is clear that California courts "would view the collective bargaining process as an appropriate datum in constructing the needed balance between the worker's privacy rights and the legitimate concerns of management." *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 117 (1st Cir. 1988), certiorari denied 490 U.S. 1107 (1989), citing *Laws v. Calmat*, supra, 852 F.2d at 433, 434, n. 5, and *Utility Workers of America, Local 246 v. Southern California Edison Co.*, supra, 852 F.2d at 1086. Other circuits as well have held that section 301 completely preempts employee challenges to the validity of employer actions involving employee drug testing and searches under state law. See, e.g., *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), certiorari denied 110 S.Ct. 1133 (1990) (privacy claim based upon search of person and request to search automobile); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (workplace search cases are "grist for the mill of grievance procedures and arbitration").

There are no reported cases to the contrary. The decisions referred to by petitioner as allegedly creating a conflict (Pet., pp. 16, 22-23) are completely inapposite. None involved a claimed privacy intrusion, and, in stark contrast to the present case, none would have required resort to the provisions of the collective bargaining agreement to determine whether the plaintiff had established a right to relief.[9]

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[9] For example, *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989), certiorari denied 110 S.Ct. 539 (1989); *Pantoja v. Texas Gas and Transmission Corp.*, 890 F.2d 955 (7th Cir. 1989), certiorari denied 110 S.Ct. 3272 (1990); *Makray v. Sara Lee Corp.*, 736 F.Supp. 793 (N.D.Ill. 1990); *Miller v. Fairchild Industries, Inc.*, 668 F.Supp. 461 (D.Md. 1987); *Brown v. Holiday Stationstores, Inc.*, 723 F.Supp. 396 (D.Minn. 1989); and *Intern. Ass'n of Machinists by McCadden v. GE Co.*, 713 F.Supp. 547 (N.D.N.Y. 1989) all involved claims for retaliatory discharge or statutory discrimination that , like the claim addressed by this Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), were not in any way dependent on the provisions of the collective bargaining agreement, and therefore were not preempted. The holdings in these cases are entirely consistent with those of the Ninth Circuit, which also treats statutory discrimination claims as not preempted by section 301. See e.g., *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 644 (9th Cir. 1989); *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1286-1287 (9th Cir. 1989); *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514, 1517 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543, 550 (9th Cir. 1988). None of petitioner's cases involves a claim that, like the right of privacy in this case, is substantially dependent upon the provisions of a collective bargaining agreement.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1431

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In the

Supreme Court of the United States

October Term, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,

Petitioners,

v.

CHEVRON U.S.A., INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The fundamental flaw in both the Opposition and the opinion of the court of appeals is that they so obliterate this Court's explicit rulings, that preemption occurs only when the claim of the plaintiff is "inextricably intertwined" with the collective bargaining agreement ("CBA"), that they produce preemption whenever there is a CBA that has any provisions, no matter how general, that might bear in some unspecified way on the plaintiff's claim. In this reply, we highlight the

most significant examples of this flaw in the Opposition and show why it underscores the need for review on both the preemption and the removal issues, which respondent improperly merges together.

1. The Petition posed three hypotheticals concerning the relationship between the CBA and Stikes' privacy claim under the California Constitution, and argued that, under the preemption and removal approach adopted by the court of appeals, in each case the claim would be preempted by section 301 of the Labor-Management Relations Act ("LMRA"). Petition at 11-12. Respondents concede the accuracy of this contention, Opposition at 9-10 n.6, and thus concede that Stikes' claim would be preempted under the decision below even if the CBA provided rights parallel to the privacy claim and even if the CBA had no bearing on the claim. What respondents fail to do is to reconcile this extraordinarily broad preemption doctrine with this Court's decisions.

In order to fend off the impact of the hypotheticals, respondents are compelled to argue that state law claims are preempted if they are " 'substantially dependent' on the *process* of construing a [CBA]." Opposition at 9 (emphasis in original). But no decision of this Court so holds, and neither did the Ninth Circuit -- it is the CBA itself on which the state claim must depend in order for the employer to obtain the benefits of federal preemption, and the dependence must be "substantial." That is what this Court held in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), that is what the Court has said in every one of its other decisions in this area, and indeed that is what respondents themselves concede elsewhere. *E.g.*, Opposition at 10 n.7 ("*only* claims that are substantially dependent on the terms of a [CBA] are preempted") (emphasis in original). To be sure, it was concerns about interference with the grievance and arbitration "process" that have driven the development of section 301 preemption doctrine.

However, the Court has only permitted state workplace laws to be actually preempted when those regulations "substantially" depend on the CBA itself, not on the mere process of contract interpretation.

Nor do respondents come to grips with the impact of their novel preemption doctrine. They argue that their approach does not leave the employee remediless because the employee may always bring a section 301 action. Opposition at 10. But they ignore the fact that, under one of the hypotheticals that they concede, the CBA contains *no* provisions bearing on privacy at all, and so a section 301 action based solely on the CBA is worthless for the employee. Similarly, they ignore the substantial differences between the remedies available under section 301 and under state law. Thus, even where the CBA incorporates state privacy law, the impact of federal preemption is to strip the employee of remedies, such as full compensatory and punitive damages, and procedures such as a jury trial, that the state has deemed necessary to compensate victims and deter privacy violations. Yet that is precisely what this Court in *Lingle v. Norge*, 486 U.S. 399 (1988), held was not preempted.

Finally, respondents make no reply to the Petition's contention, at 13-14, that the overbroad preemption doctrine adopted below fails to accommodate the state and federal interests at stake. As petitioner reads this Court's rulings, a theoretical dependence on provisions of a CBA is not enough to warrant federal preemption; rather, actual dependence is required, and it is necessary to inspect the CBA closely enough to determine whether there are provisions that appear to have some bearing on the state law claim. *Cf. Conrail v. RLEA*, 491 U.S. 299 (1989) (court must decide whether the employer is "arguably justified" in contending that the CBA licenses its conduct before declaring a dispute "minor," thus invoking grievance procedures under Railway Labor Act). *See also Lingle, supra*, 486 U.S. at 413 n.12 (1988) (case could

include some propositions that depend on CBA and some that do not, without entire claim being preempted). Otherwise, any employer with sufficient imagination could "construe" a clause in a CBA as bearing on any state law claim, with the result that the claim would be preempted, even though the CBA in fact was neither the basis of the claim, nor had any actual bearing on it.[1]

2. The Petition also showed that the lower courts continue to struggle with the question of how much dependence on a CBA is too much and that review is also warranted to clarify this issue. Other circuits have been scrupulous to avoid finding preemption based on merely theoretical dependence of a state law claim on the provisions of a CBA, and have allowed "the process" of CBA interpretation to function while permitting the state law claim to proceed if, after arbitration, it turns out that the CBA does not bar the state law claim. Several such appellate decisions are cited in the Petition, at 22-23,[2] and in denying the existence of a conflict among the circuits, Opposition at 11-12 and n.9, respondents simply ignore them.

Even with respect to the conflicting cases that respondents do acknowledge, they rely entirely on labels to distinguish those decisions from the ruling below. The other cases are not in conflict, say respondents, Opposition at 12 n.9, because those are retaliation or discrimination cases, while this is a privacy case. But respondents ignore the fact that the employer in each of these cases tried to obtain preemption by

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[1] Here, the only CBA provisions that respondents are able to identify as bearing on the state law privacy issue are two clauses that emphasize the general importance of workplace safety, but do not even mention its relation to claims of privacy. Opposition at 2.

[2] *E.g.*, *Matter of Chicago, Milwaukee RR Co.*, 852 F.2d 960 (7th Cir. 1988); *Dougherty v. Parsec*, 872 F.2d 766 (6th Cir. 1989).

arguing that the CBA undercut an element of the plaintiff's state law claim, and the nature of that claim, be it retaliation or discrimination, was irrelevant to the preemption sought.[3]

3. The Opposition contains another key concession: it admits that if the state law claim is ultimately preempted, removal is nonetheless improper if the CBA becomes relevant to the state law claim only to support the employer's defense. Opposition at 3-4, *quoting* distinction with approval; *see also id.* at 6-7. *Accord*, *Welch v. General Motors Corp.*, 922 F.2d 287, 293 (6th Cir. 1990). In order to show the defensive nature of the CBA here, the Petition advanced two propositions. First, the only possible relevance of the CBA under state law is to show that petitioner's union had waived his state privacy rights. Petition at 5. Second, even if a CBA could be relevant to the determination of an employee's reasonable expectations, it would be relevant to the employer's attack on reasonableness, but not be part of the employee's case. *Id.* at 17.

Respondents completely ignore the second argument, and cite not a single decision in trying to rebut the first argument. Almost all of page 7 of the Opposition is consumed by a string citation for the proposition that privacy rights depend on the reasonable expectations of the parties which, in turn, "*is measured by common habits in the use of domestic and business properties.*" *Id.* (emphasis in original). But this test, found in a California Supreme Court decision that respondents cite, looks not to a particular agreement between the parties, but rather to trends and patterns in business and social relationships as a whole. Indeed, on the

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[3] Contrary to respondents' assertion, Opposition at 12, some courts hold that state law privacy claims survive section 301 preemption. *Cronan v. New England T&T Co.*, 1 IER Cases 658, 661 (D. Mass. 1986); *Cokely v. Pacific Gas & Elec.*, 119 LRRM 3455, 3458 (N.D. Cal. 1984).

following page, when respondents turn from their string citation to the key proposition on which their argument depends -- that the "foremost" circumstance bearing on the reasonable expectations of the parties is a CBA -- they provide not a *single* citation, to either a state or a federal decision. Opposition at 8. Later in the Opposition, when respondents return to the question of how state privacy law treats a CBA, they cite three decisions -- one dictum from an intermediate California appellate court, and two previous Ninth Circuit holdings -- for the proposition that a CBA may be relevant to a state law privacy claim because it may waive state privacy rights. Opposition at 10 n.8, and accompanying text. Yet that is precisely the relationship between CBA and privacy that they earlier took such pains to deny, and one that they admit is insufficient to support removal.[4]

Petitioner acknowledged the one California case containing dictum supporting waivability, while pointing out that another intermediate state appellate court decision had held that state law privacy rights may not be waived because the California Constitution describes the right as "inalienable." Petition at 5-6. Because the California courts have not yet sorted out how they view asserted "waivers" of the right of privacy, it is especially important that federal removal and preemption doctrine be applied to permit cases involving such waiver defenses to be litigated in the California courts, rather than the federal courts. Otherwise, removal (or a refusal to abstain) prevents the state courts from construing their own state's law in such a way as to avoid a constitutional confrontation with federal law.

As a result of the decision below, only the most foolhardy

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[4] The state case cited by respondents did not, in fact, discuss whether a CBA may waive privacy rights; it simply indicated that the plaintiff there could have voluntarily submitted to urinalysis without violating public policy.

employer would fail to remove a state law privacy claim to federal court to take advantage of the sweeping preemption granted by the Ninth Circuit. Consequently, the California courts will never have the opportunity to address the issue of the relationship between a CBA and the California right of privacy. Only by reviewing and reversing the decision below can this Court ensure that it is the California courts, not the federal courts, that will have the final word on this important question of state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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